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CHARLES ELMORE C

No. 359

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

SEATTLE GAS COMPANY, a corporation,
Appellant,

vs.

CITY OF SEATTLE, a municipal corporation,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

Brief of Appellant

C. K. POE,
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J. F. FALKNOR,
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Seattle, Washington.

IVY PRESS, SEATTLE

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Brief of Appellant

OPINION OF THE COURT BELOW.

In this case the Supreme Court of the State of Washington rendered a *per curiam* opinion, which appears in the record at page 59. The opinion states that the same questions are raised in the cases of

Pacific Telephone & Telegraph Company vs. Seattle and *Puget Sound Power & Light Company vs. Seattle* and for the reasons stated in those opinions entered the judgment from which this appeal is taken.

The opinion in the Telephone case appears in the record at page 45 and in the Puget Sound Power & Light Company case at page 35.

The official report of these cases has not been published but will probably appear in Vol. 172 of the Washington reports.

JURISDICTION.

The judgment to be reviewed is dated June 14, 1933 (R. 60). The grounds upon which jurisdiction of this court is invoked are fully set forth in the statement as to jurisdiction, which is separately printed.

STATEMENT.

This appeal involves the validity and constitutionality of Ordinance No. 62662 of the City of Seattle, by which the appellee seeks to impose an occupation tax upon appellant equal to 3 per cent of its total gross income from selling or furnishing gas in the City of Seattle. Recognizing the obscure and unintelligible terms of the ordinance and the impos-

sibility of determining therefrom with any degree of exactitude how its total gross income could be determined or computed, the appellant (nevertheless fearing the extreme penalties imposed) filed a return and paid the first installment of said tax under protest. Immediately thereafter it brought this suit to recover the installment so paid and to enjoin the further enforcement of the ordinance. The city interposed a general demurrer to the amended complaint, which the trial court sustained. Appellant having elected to stand upon its amended complaint, judgment of dismissal was entered and upon appeal to the Supreme Court of the State of Washington that judgment was sustained. The demurrer, of course, admits all facts well pleaded and the complaint must be read in the light of the well established principle that a taxing act must be construed strictly in favor of the taxpayer and against the sovereign. The relevant portions of the ordinance are these:

"ORDINANCE No. 62662.

AN ORDINANCE relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. *Exercise of Revenue License Power:* The provisions of this ordinance shall be deemed an exercise of the power of the City of Seattle to license for revenue.

Section 2. *Definitions:* In construing the provisions of this ordinance, save when otherwise plainly declared or clearly apparent from the context, the following definitions shall be applied:

GROSS INCOME: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses.

Section 3. *'Occupation License' Required:* After the 1st day of July, 1932, no person shall engage in or carry on any business, occupation, pursuit or privilege for which a license fee or tax is imposed by this ordinance without having first obtained, and being the holder of, a valid and subsisting license so to do, to be known as an 'Occupation License.'

Any person engaging in, or carrying on, more than one such business, occupation, pursuit or privilege shall pay the license tax so imposed upon each of the same.

Any taxpayer who engages in, or carries on, any business subject to tax hereunder without having his 'Occupation License' so to do, shall be guilty of a violation of this ordinance for each day during which the business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax or any part thereof on or before the due date shall be deemed to be operating without having his license so to do.

Section 5. *Occupation Subject to Tax—Amount:* There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income, as follows:

(a) * * * * *

(b) Upon every person engaged in or carrying on the business of selling or furnishing gas and/or water for hire, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

(c) * * * * *

* * * * * *

Section 6. *City of Seattle Subject to Tax:* Subdivisions (b) and (c) of Section 5 shall, so far as permitted by law, be applicable to the City

of Seattle, except that said City shall not, as a taxpayer, be required to conform to the other provisions of this ordinance.

* * * * * *

Section 15. *Taxpayer to Keep Books and Records—Returns Confidential:* It shall be the duty of each taxpayer taxed upon his gross income to keep and enter in a proper book or set of books or records an account which shall accurately reflect the amount of his gross income, which account shall always be open to the inspection of the City Comptroller, or his duly authorized agent, and from which said officer or his agent may verify the return made by the taxpayer.

The applications, statements or returns made to the City Comptroller, pursuant to this ordinance, shall not be made public nor shall they be subject to the inspection of any person except the Mayor, the Corporation Counsel, the City Comptroller, or his authorized agent, and members of the City Council.

Section 16. *Comptroller to Investigate Returns:* If any taxpayer fails to apply for license or make his return, or if the City Comptroller is dissatisfied as to the correctness of the statements made in the application or return of any taxpayer, said officer, or his authorized agent, may enter the premises of such taxpayer at any reasonable time for the purpose of inspecting his books or records of account to ascertain the amount of the fee or tax or to determine the correctness of such statements, as the case may be, and may examine any person under oath administered by said officer, or his agent, touching the matters inquired into, or said officer, or his authorized agent, may fix a time and place

for an investigation of the correctness of the return and may issue a subpoena to the taxpayer, or any other person, to attend upon such investigation and there testify, under oath administered by said officer, or his agent, in regard to the matters inquired into and may, by subpoena, require him, or any person, to bring with him such books, records and papers as may be necessary.

* * * * * *

Section 24. *Penalty:* Any person violating or failing to comply with any of the provisions of this ordinance or any lawful rule or regulation adopted by the City Comptroller pursuant thereto, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine in any sum not to exceed Three Hundred ($300.00) Dollars, or by imprisonment in the City Jail for a term not exceeding ninety (90) days, or by both such fine and imprisonment."

The amended complaint (R. 1) alleges in substance that the appellant is a domestic corporation, engaged in the manufacture and sale of gas to the inhabitants of Seattle and certain portions of King County for illuminating, cooking, heating, manufacturing and many other purposes for which the appellee sells electricity in strict and keen competition with the appellant. The activities are carried on by appellant under two franchises granted by the City which are described by title and number. The City conducts its electrical business in its proprietary, as distinguished from its governmental, capacity; it is unregulated as to rates, rules and practices and

pays no taxes. On the other hand, appellant is under the exclusive jurisdiction of the Department of Public Works, which regulates its rules, rates and practices. (Rem. Revis. Stat. of Wash., Sec. 10362.) It pays annual taxes for state, county and city purposes on all its property, including said franchises. The City, in the conduct of its business, is actively engaged in soliciting appellant's customers, actual and potentional, to use electricity instead of gas and in order to retain its customers appellant is obligated to sell more heat units at a given price than are supplied by the City for the same price. Since the imposition of the Occupation Tax, the City has not increased its rates so that it may pay itself the tax the ordinance purports to impose against it, and it is stated inferentially that the rates charged by the City automatically regulate the rates which appellant may charge.

That the City may not now impose or burden appellant's franchise rights by requiring it to procure and pay for the additional license which the ordinance requires.

That the City has from time to time issued general lien bonds for constructing and extending its electric light plant and system, of which there are now the principal amount of approximately $1,447,-

000.00 outstanding. In addition to this, revenue bonds were issued by the City from time to time of which $32,852,000.00 are now outstanding.

Under Section 9491 of Remington's Revised Statutes, these revenue bonds are obligations argainst only the gross revenue received from the sale of electric light and power by the City and all such gross revenues are by law and the various ordinances under which the revenue bonds were issued from time to time pledged to the payment of the principal and interest of said bonds, which pledge constitutes a charge upon said gross revenue prior and superior to all other charges whatsoever, including charges for maintenance and operation.

It is further alleged that the City is not obligated to pay the license fee or tax which the ordinance under attack purports to impose upon it and that the terms of said ordinance are not enforceable against the City. That in truth and in fact the City has not paid the license fee or tax specified in said ordinance and has no legal authority to pay the same.

It is also alleged that under duress and coercion and in order to enable appellant in a lawful manner to contest the validity of said ordinance, appellant, under protest, paid the first installment of the tax imposed, which amounted to $5,500.66.

QUESTIONS PRESENTED TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

The only questions presented below which we are now urging may be concisely stated as follows:

1. Does the 3 per cent license tax imposed upon appellant by Ordinance No. 62662 of the City of Seattle deprive appellant of its property without due process of law in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that a similar burden is not imposed upon the municipal electric plant which the City conducts in its private capacity in keen competition with the gas business conducted by the appellant under its franchises?

The Supreme Court of the State of Washington held that it did not.

2. Can the City of Seattle, without violating the due process and equal protection clauses of Section 1 of the Fourteenth Amendment, tax appellant 3 per cent of its gross income from the sale of gas and not impose a like tax upon the gross income from its privately owned electric plant?

The Supreme Court of the State of Washington held that it could.

3. Whether under the facts of this case said ordinance constitutes an impairment of appellant's contractual franchise rights in contravention of Section 10 of Article I of the Constitution of the United States.

The Supreme Court of the State of Washington held that it did not.

4. Whether the definition of "gross income" contained in Section 2 of the ordinance is so vague and uncertain that its attempted enforcement against appellant would violate the Fourteenth Amendment.

The Supreme Court of the State of Washington held that it is not.

SPECIFICATION OF ERRORS.

1. That the Supreme Court of the State of Washington erred in holding that the provisions of Ordinance No. 62662 of the City of Seattle, in so far as they apply to appellant, do not abridge the rights of appellant, Seattle Gas Company, guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. That the Supreme Court of the State of Washington erred in holding that said Ordinance No. 62662, which imposes a tax of 3 per cent upon ap-

pellant's gross revenues from the business of selling gas in the City of Seattle and neglects to impose the same or similar tax upon the electric business of the appellee owned and conducted by the appellee in said City of Seattle, is not discriminatory and confiscatory and does not deprive appellant of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States. The tax so imposed is for revenue purposes only, and the appellee, The City of Seattle, owns and operates its electric business solely in its private or proprietary capacity and in the operation of said business in no sense exercises any of its governmental functions.

3. That the Supreme Court of the State of Washington erred in holding that although the appellant sells gas to the inhabitants of the City of Seattle for the same uses and purposes for which the appellee in its proprietary capacity sells such inhabitants electricity, and that though their businesses are highly competitive, the appellee may lawfully exempt itself from taxation and tax appellant 3 per cent upon its gross revenues, as is done by said Ordinance No. 62662, and that said ordinance does not deny appellant the equal protection of the law and deprive it of its property without due process of

law, in violation of the Fourteenth Amendment to the Constitution of the United States.

4. That the Supreme Court of the State of Washington erred in holding that under the facts of this case, the tax imposed upon appellant by said Ordinance No. 62662 does not constitute an appropriation and illegal taking of appellant's property without compensation, and does not deprive appellant of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States, and even though the City of Seattle could and did by said ordinance actually imposed upon itself the same tax which by said ordinance it attempts to impose upon appellant.

5. That the Supreme Court of the State of Washington erred in refusing to hold that said Ordinance No. 62662, under the conceded facts of this case, is repugnant to the Fourteenth Amendment to the Constitution of the United States because it is an illegal attempt by the City of Seattle to exercise its governmental power of taxation to confiscate appellant's property in aid of appellee's proprietary and private business of selling electricity to the inhabitants of the City of Seattle in competition with appellant who sells them gas for the same or similar purposes, and in not holding that the design or effect

of said ordinance is to eliminate appellant as a competitor of the City of Seattle.

6. That the Supreme Court of the State of Washington erred in holding that said Ordinance No. 62662 of the City of Seattle does not constitute an impairment of the appellant's franchise contract rights, in contravention of Section 10 of Article I of the Constitution of the United States.

7. That the Supreme Court of the State of Washington erred in refusing to hold that the ordinance is repugnant to the Fourteenth Amendment to the Constitution of the United tates in that said ordinance, and particularly the definition of "gross income" in Section 2 thereof is vague, indefinite and uncertain.

SUMMARY OF ARGUMENT.

The tax imposed by the ordinance is confiscatory, takes appellant's property without compensation and deprives it of its property and property rights without due process of law because:

1. The City is seeking to exercise the governmental power of taxation in order to advance the interests of the electric business which it conducts in its proprietary capacity and thus destroy appellant as a competitor.

2. The attempt by the City to equalize and legalize the tax by imposing a similar tax upon its own business was but an idle gesture and wholly void.

3. The imposition of the tax impairs the contract obligations created by appellant's franchises and requires appellant to pay for a license, to do precisely what its franchises authorize, imposes additional and erroneous burdens upon the franchises and grants no additional privileges.

4. The definition of "gross income" contained in the ordinance is so vague and indefinite that the amount of tax sought to be imposed cannot be ascertained with reasonable certainty.

ARGUMENT.

I AND II.

THE TAX IS CONFISCATORY AND VOID BECAUSE THE CITY IS SEEKING TO EXERCISE THE GOVERNMENTAL POWER OF TAXATION TO DESTROY APPELLANT AS A COMPETITOR.

The complaint alleges and the demurrer admits that appellant and appellee are competitors in that the one sells gas and the other electricity to the same class of customers for the same uses and purposes. The uses to which their product is put are in most cases identical.

It has been judicially decided that these businesses are too similar to be classified differently for taxation purposes.

> "This occupational tax I think invalid, as violating the Constitution of the State of Nebraska, requiring it to be uniform upon persons and property. In my judgment, an electric plant, which furnishes to the public light, heat, and power should be classed the same as a gas plant, which furnishes to the public light, heat, and power. The fact that one furnishes the light, heat and power by means of an electric current—the other by a current of gas—does not, in my judgment, justify a difference in classification. So far as the patrons are concerned, it is results that are sought for, and it is results which the respective parties furnish the public—results being light, heat, and power."
>
> *Lincoln Gas & Electric Co. vs. City of Lincoln*, 182 Fed. 926, 929.
>
> *City vs. Lincoln Gas & Electric Light Co.*, 158 N. W. 962.

It is further alleged that because of this competition appellant is obliged to supply more heat units per dollar than the City. This obviously shows that the price charged by the City automatically fixes appellant's rates and charges. It follows that where the City as sovereign imposes tax burdens upon appellant's business which are not equally imposed upon its own competing private utility business that it thereby starts a process of confiscation which must

ultimately result in the wrongful seizure and uncompensated taking of appellant's property without due process of law.

It is attempting, through the process of taxation, to destroy appellant's utility in order to foster its own. This, we submit, cannot be done.

> "In other words, when acting clearly within the domain of its private and proprietary capacity, the city may not *draw sustenance or power* to itself through an assumption of public and governmental functions."
>
> *Los Angeles Gas & Electric Co. vs. City of Los Angeles*, 241 Fed. 912, 918.

The effect and not the form of a tax is the ground upon which its validity should be tested.

> *Educational Film Corporation vs. Ward*, 282 U. S. 379.
>
> *McCallen vs. Massachusetts*, 279 U. S. 620.

In the conduct of its business of operating an electric plant, the City is engaged in a private capacity and the ordinance attacked is in no sense a police measure.

In the opinion in *Puget Sound Power & Light Company vs. Seattle*, which is by reference adopted as part of the opinion in this case, it is said (R. 37):

> "The city, in its proprietary capacity, is in competition with appellant in the power and light

business. The possible consequences to appellant, if it is subjected to an excise of three per cent on its gross revenues, while its competitor escapes the burden, are too obvious for discussion. Evidently having such consequences in mind, the city council, by virtue of Sec. 6 of the ordinance, has undertaken to subject the city's power and light business to the tax imposed upon persons and corporations engaging in that business. This is merely a more or less friendly gesture. The city has not allocated, and probably cannot allocate, any of the revenues of its power and light business to the payment of such a tax. Bonds have been issued in excess of $30,000,000 against the revenues from that business; and those bonds are a prior lien on the entire income from it—taking precedence even over operating charges. Conceding that the city's light and power revenues could be subjected to the tax, no machinery is set up in the ordinance to accomplish such an end. Furthermore, in making up its budget for 1932, no provision was made for the levy of general taxes to cover the excise provided for in the ordinance. So the problem must be met as though Sec. 6 had been omitted from the ordinance; as though the city had levied the excise on the appellant and exempted its own light and power business therefrom."

This quotation, we submit, decides at least two propositions which are binding on this court:

(a) The City in the conduct of its electric plant is acting in a proprietary capacity;

(b) That the City lacks authority to impose the tax upon itself which it pretended to impose by Section 6 of the ordinance.

It also recognizes how burdensome, if not destructive of appellant's business, the imposition of the tax will be if the City escapes a like burden. In other words, the tax creates an abnormal, unfair and revolutionary competition which no business can stand. For that reason it is confiscatory and deprives appellant of the protection of the Fourteenth Amendment to the Constitution of the United States.

We submit on the point at issue little can be added to what Judge Steinert says in his dissenting opinion (R. 43):

> "The crowning reason, in my opinion, for holding the ordinances inoperative and void as to this appellant is that it constitutes an unlawful exercise of the city of a governmental power in aid of its proprietary business. The city is a competitor of the appellant. Both are engaged in a similar business for profit. The appellant's franchise is not exclusive, hence it can not complain of competition. It may not even complain if the city should see fit to appropriate its property for public use by condemnation. But so long as appellant is permitted to function as a competitor, its property may not be taken from it without due process of law, and that, in effect, is just what the ordinance does. The validity of the tax must be determined by its true operation and effect on the basis of the results which follow its operation. *Aberdeen Savings & Loan Assn. vs. Chase,* 157 Wash. 351, 289 Pac. 536; *Educational Films Corp. vs. Ward,* 282 U. S. 379, 75 L. Ed. 400."

To sum the argument, it is obvious that if the tax is sustained the City will in a short while not only have acquired appellant's business through an unfair process of elimination but also have received an annual tax of some $60,000.00 by way of a bonus for destroying it.

III.

The Imposition of the Tax Impairs the Contract Obligations Created by Appellant's Franchises and Requires Appellant to Pay For a License to Do Precisely What Its Franchises Authorize, Imposes Additional and Erroneous Burdens Upon the Franchises and Grants No Additional Privileges.

Appellant's franchises are contracts and license it to conduct the very business to which the ordinance is directed, i. e., "carry on the business of selling or furnishing gas" (quotation from ordinance).

> "A franchise conveys rights, and if their exercise could be prevented or destroyed by simple declaration of a municipal council, they would be infirm, indeed, in tenure and substance. It is to be remembered that they come into existence by compact, having, therefore, its sanction, urged by reciprocal benefits, and are intended and can only be exercised by expenditure of money, making them a matter of investments and property, and entitled as such against being taken without

the proper process of law—the payment of compensation."

Los Angeles vs. Los Angeles Gas & Electric Co., 251 U. S. 32.

New York Electric Line vs. Empire City Subway Co., 235 U. S. 179.

Hot Springs Elec. Co. vs. Hot Springs, 70 Ark. 300, 67 S. W. 761.

Upon the faith of these contractual grants or licenses appellant has expended millions of dollars in the construction of a plant devoted to the public service. We submit that the City cannot legally say, "You have expended millions in the construction of your plant and distribution system but as you compete with our electric plant, you can no longer sell gas unless you take out another and different franchise or license upon terms which will put you out of business and give us the field."

In other words, the City is without authority to add to or subtract from the powers which the franchises license or convey. We submit that it follows that if these franchises carry a license to manufacture and sell gas, the City cannot require appellant to take out another or different license or permit to do those things on pain of fine or imprisonment. We are already licensed and do not have to submit to a re-licensing.

However, the City has done nothing less, for Section 3 of the ordinance prevents the conduct of our business unless we take out a new license to be known as an "Occupation License" and makes us "* * * guilty of a violation of this ordinance for each day during which the business is so engaged in or carried on * * *" without the license, and by Section 24 imposes heavy penalties by fine and imprisonment for exercising our franchise rights without the new license.

We do not deny that ordinarily the grant of a franchise does not operate as a surrender by the sovereign of its right to tax. This, however, we think is totally different from saying that the City can and may require a new and different license of an already licensed occupation. In other words, the question is, can the City, in order to create the foundation of a tax, compel appellant to take out a license to do precisely what it is authorized to do by its franchises, without granting any new or additional privileges? Our answer is that it cannot, because the exaction of a new license is destructive of our franchise prerogatives and privileges. It follows that to permit the City to do what it is attempting to do will be to permit an impairment of the rights guaranteed appellant by Section 10 of Article I of the Constitution.

IV.

The Definition of Gross Income Contained in the Ordinance Is So Vague That the Amount of the Tax Sought to Be Imposed Cannot Be Ascertained With Reasonable Certainty.

This court has repeatedly declined to sustain laws which are vague and uncertain.

Connally vs. General Const. Co., 269 U. S. 385.

Champlin Refining Co. vs. Corporation Comm. of Okla., 286 U. S. 210.

International Harvester Corp. vs. Kentucky, 234 U. S. 216, 222.

Collins vs. Kentucky, 234 U. S. 634, 638.

United States vs. Cohen Grocery Co., 255 U. S. 81.

Small Company vs. American Sugar Refining Co., 267 U. S. 233.

Cline vs. Frink Dairy Co., 274 U. S. 445, 455.

Smith vs. Cahoon, 283 U. S. 553.

The rule is peculiarly applicable to taxing acts, which are to be strictly construed.

"'It is of the utmost importance, for the protection of the taxpayer, that tax laws should be certain; both as to the thing taxed and as to the amount of the tax, and the manner for its ascertainment; that the taxpayer may have an opportunity without the expense of litigation, to pay such taxes as he may owe; and a tax law which does not accomplish this purpose ought to be

held invalid, whether this results from an attempted exercise of power not possessed, through which the law becomes uncertain by both proper and improper subjects being combined, and selected for taxation, or by the failure of the legislature for any other reason to furnish the rules by which taxes may be levied, assessed and collected.'"

State vs. Humble Pipe Line Co., 122 Texas, 373, 247 S. W. 1082, 1083.

The case of *State ex rel. Attorney General vs. West Side Street Ry. Co.*, 146 Mo. 145, 155, 47 S. W. 959, 961, seems directly in point.

"The courts cannot venture upon the dangerous path of judicial legislation to supply omissions or remedy defects in matters committed to a co-ordinate branch of the government. It is far better to wait for necessary corrections by those authorized to make them, or, in fact, for them to remain unmade, however desirable they may be, than for judicial tribunals to transcend the just limits of their constitutional powers.

* * * * * *

"Upon what gross earnings is the percentage to be computed? A large capital must be invested in the machinery and appliances for conducting a street railway, aside from the tracks laid in the streets. The act seems to contemplate that the bid shall be a percentage only of the receipts derived from the use and occupation of the public property. How is the proper proportion of the gross earnings that should be attributed to the capital invested in the power stations, machinery, etc., to be ascertained? Shall it be by valuing the entire plant, and deducting therefrom

the proper valuation of the machinery, and apportioning the gross earnings according to these amounts? If so, how shall this value be fixed and by whom? The act furnishes no answer."

Counsel for the *Pacific Telephone & Telegraph Company,* whose case is set for hearing on the same day as this, show most convincingly in their brief that the term "gross income" as defined in Section 2 of the ordinance is wholly incomprehensible and consequently void. Most that they say is equally applicable to this appellant and for that reason we content ourselves by adopting their argument and quoting from the dissenting opinon of Judge Steinert (R. 57), which states the proposition quite clearly.

> "Further, I think that the definition of 'Gross Income,' in the ordinance, is so vague and uncertain as to render the ordinance inoperative and void. By its provisions the ordinance is penal. Fine and imprisonment are the penalties for noncompliance. The taxpayer is entitled to know definitely and certainly the amount of tax which he is required to pay and the method of its ascertainment, without the expense of litigation necessary to determine either. *Western Union Telegraph Co. vs. Texas,* 62 Tex. 630; *State ex rel. Crow, Attorney General, vs. West Side Street Ry. Co.,* 146 Mo. 155, 47 S. W. 959; *Standard Oil Co. vs. State,* 178 Ala. 400, 59 So. 667; *Winslett vs. Case-Fowler Lumber Co.,* 173 Ga. 539, 160 S. E. 364.
>
> "Looking at the terms of the ordinance, I do not see how the taxpayer could possibly determine the amount of tax to be paid by it, or the

method of its ascertainment, without resort to litigation. Different and vitally conflicting views will arise out of the interpretation of its language. Section 2 of the ordinance reads as follows, with reference to the definition of income:

"'Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emol [fol. 71] uments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages or other evidences of indebtedness or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor, costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses.'

"Does the word 'value' as there used import 'cost price,' 'sale price,' or 'net profit' on the sale of tangible property or service? If any one of these was intended, it could easily have been expressed. Again, the word 'receipts' expressly excludes receipts or proceeds from the use or sale of real property. Appellant's equipment to the extent of millions of dollars is housed in, and in large part is permanently affixed to, buildings which are a part of the realty. Are the receipts from that source, *pro tanto,* to be deducted? Who shall say? How is anyone to know? It may confidently be assumed that the city will insist that no deductions are to be made in that respect. As confidently may it be assumed that the appellant will insist to the contrary. Many other questions are raised by the wording of this section, all of which lead to confusion in the attempt to inter-

pret them. The majority opinion says that the definition of 'Gross Income' in the present ordinance is substantially the same as that contained in the act of West Virginia, considered and sustained in the case of *Hope Natural Gas Co. vs. Hall, State Tax Commissioner,* 274 U. S. 284. I do not so read it. That act provided that persons engaging in certain businesses should pay a tax 'equal to the value of the articles produced as shown by the gross proceeds derived from the sale thereof by the producer (except as hereinafter provided) multiplied by the respective rates.' The language is not only entirely different, but upon its very face it shows that the tax is to be computed on the gross sales of the products. No such certainty or definiteness appears here. The rule by which the tax is to be measured should be definite and certain, and its definiteness and certainty should appear from its provisions [fol. 72] and not be the product of either litigation or compromise."

For the reasons stated in this brief and in the briefs of the Pacific Telephone & Telegraph Company and Puget Sound Power & Light Company, the judgment of the Supreme Court of the State of Washington should be reversed.

Respectfully submitted,

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